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## Sunset Legislation: Spotlighting Bureaucracy

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## SUNSET LEGISLATION: SPOTLIGHTING BUREAUCRACY

Few proposals for reforming the governmental bureaucracy have been accepted as rapidly as "sunset."<sup>1</sup> Since the adoption of the Colorado Sunset Act of 1976,<sup>2</sup> twenty-three states have enacted sunset legislation.<sup>3</sup> Similar measures are being considered by most other states<sup>4</sup> and in Congress.<sup>5</sup>

Under sunset legislation, specified sets of governmental entities<sup>6</sup> are terminated unless they undergo regularly scheduled legislative review and are found to meet certain criteria. These statutes are designed as action-forcing mechanisms to overcome legislative lethargy in conducting oversight by creating "an incentive for periodic and comprehensive executive and legislative evaluation of existing programs and agencies."<sup>7</sup> The incen-

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<sup>1</sup> The term "sunset" legislation was coined by Common Cause, a public interest lobbying organization. It complements sunshine laws, which are designed to promote public access to administrative proceedings. The automatic termination concept implicit in sunset statutes is not a new one, however. Former Justice William O. Douglas proposed the idea to Franklin Roosevelt in the 1930's, W. DOUGLAS, *GO EAST, YOUNG MAN* 297 (1974), and Professor Lowi advocated a "tenure of statutes act" in 1969, T. LOWI, *THE END OF LIBERALISM* 309 (1969). Professor Lowi also seems to support sunset legislation. *Wall St. J.*, Nov. 21, 1977, at 23, col. 1.

<sup>2</sup> COLO. REV. STAT. § 24-34-104 (Supp. 1977).

<sup>3</sup> ALA. CODE tit. 41, § 20-1 (Supp. 1977); ALASKA STAT. § 44.66.010 (Supp. 1977); ARK. STAT. ANN. § 5-1201 (Supp. 1977); COLO. REV. STAT. § 24-34-104 (Supp. 1977); Reorganization of Executive Branch of State Government, 1977 Conn. Legis. Serv. act 77-614, § 572, at 1543 (West); FLA. STAT. ANN. § 11.61 (West Supp. 1977); GA. CODE ANN. § 84-101b (Supp. 1977); Hawaii S.B. 460, Common Cause, State-By-State Survey of Sunset Activity (Aug. 25, 1977); IND. CODE ANN. § 4-26-1-1 (Burns Supp. 1977); LA. REV. STAT. ANN. § 49.190 (West Supp. 1977); ME. REV. STAT. tit. 3, § 503 (Supp. 1977); MONT. REV. CODES ANN. § 82-4601 (Supp. 1977); 1977 Neb. Laws no. 257, § 1, at 829 (1977); 1977 N.H. Laws ch. 436; New Mexico Sunset Law, 1977 N.M. Laws ch. 259, § 1, at 2040; 1977 N.C. Adv. Legis. Serv. ch. 712, § 1, at 475; OKLA. STAT. ANN. tit. 74, § 3901 (West Supp. 1977); 1977 Digest of Ore. Laws ch. 842; R.I. Gen. Laws § 42-67-1 (Supp. 1977); 1977 S.D. Sess. Laws ch. 3, § 1, at 25; TENN. CODE ANN. § 4-2901 (Supp. 1977); TEX. STAT. ANN. § 5429k (Supp. 1978); UTAH CODE ANN. § 63-55-1 (Supp. 1977); Washington Sunset Act of 1977, 1977 Wash. Laws ch. 289, § 1, at 861.

<sup>4</sup> For a recent synopsis, see Common Cause, State-By-State Survey of Sunset Activity (Aug. 25, 1977).

<sup>5</sup> The proposed Program Evaluation Act of 1977, S. 2, 95th Cong., 1st Sess. (1977), was unanimously recommended by the Senate Governmental Affairs Committee and is awaiting action on the Senate floor. Sen. Comm. on Governmental Affairs, Program Evaluation Act of 1977, S. REP. NO. 95-326, 95th Cong., 1st Sess. (1977). Apparently S. 2 has been delayed in the Senate Rules Committee, because of the widespread view of committee chairmen that it could "substantially increase their workload." 35 CONG.Q. WEEKLY REP. 2528 (1977); 36 CONG.Q. WEEKLY REP. 52 (1978).

<sup>6</sup> This note uses the terms "entity" and "activity" to denote those governmental units subject to sunset legislation. This terminology avoids the possible confusion caused by the applicability of sunset to regulatory agencies, administrative departments, governmental programs, and even organizations within the legislative and judicial branches.

<sup>7</sup> Adams, *Sunset: A Proposal for Accountable Government*, 28 ADMIN. L. REV. 511, 514 (1976).

tive is provided by fixed cyclical dates for the termination of particular categories of governmental activities which can be averted only by evaluation and reauthorization. Thus, legislative examination is a prerequisite to the continued existence of the entity.<sup>8</sup>

Sunset legislation is a reaction to mushrooming, complicated, and largely unsupervised government.<sup>9</sup> State agencies are sometimes obscure and incompetent,<sup>10</sup> while federal agencies are extremely large and complex.<sup>11</sup> The situation is compounded by what Professor Jaffe has described as the arteriosclerotic process in administrative agencies<sup>12</sup> and by regulatory agencies which develop disturbingly close ties with the subjects of their regulatory power.<sup>13</sup>

Sunset laws have broad philosophical appeal. Efficient government, one of the articulated goals of sunset legislation, is difficult to oppose.

<sup>8</sup> There have been tentative steps toward automatic termination in the past. The Federal Advisory Committee Act, U.S.C. app. § 1 (1972), as amended by Pub. L. No. 94-409, § 5(c), 90 Stat. 1247 (1976), mandated an end to Presidential commissions and boards after two years unless reinstituted. More than 700 boards and commissions have been terminated in the last five years; because of the creation of 525 other boards in the same period, 1250 remain. *Sunset Act of 1977: Hearings on S. 2 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. 265 (1977) (statement of Senator Glenn) [hereinafter cited as 1977 *Hearings on S. 2*]. Other federal statutes have incorporated termination dates. Thus, the Federal Energy Administration Act of 1974, which established the Federal Energy Administration, specifically provided for its termination. 15 U.S.C. § 761 (1970). Similarly the Voting Rights Act of 1965 provided for termination after ten years. 42 U.S.C. § 1973(k) (1970).

<sup>9</sup> A January 1977 Gallup poll found that 39% of Americans believed big government to be the "biggest threat to the country in the future," far ahead of big labor (26%) and big business (23%). A 1976 Harris survey found that people by a 76% to 16% margin thought the "trouble with government is that the elected officials have lost control over the bureaucrats who really run things." 1977 *Hearings on S. 2*, *supra* note 8, at 308 (statement of David Cohen).

<sup>10</sup> The Colorado experience in examining state regulatory panels is one example. The Court Stenographer's Board was found to be improperly restricting entry of persons into the field, not policing the area it was supposed to regulate, and keeping inadequate records. *Government Economy and Spending Reform Act of 1976: Hearings on S. 2925 Before the Subcomm. on Inter-Governmental Relations of the Senate Comm. on Government Operations*, 94th Cong., 2d Sess. 63 (1976) (statement of Gerald Kopel, Colorado State Legislator) [hereinafter cited as 1976 *Hearings on S. 2925*].

<sup>11</sup> See 1977 *Hearings on S. 2*, *supra* note 8, at 131 (statement of Senator Barry Goldwater). A General Accounting Office report on the federal aid system to state and local governments concluded that the program involved inadequate flow of information, unnecessary complexity, uncertainty as to future funding, duplication, lack of coordination, inconsistency, and general waste. See 1976 *Hearings on S. 2925*, *supra* note 10, at 526-29 (GAO Report to the Congress: Fundamental Changes are Needed in Federal Assistance to State and Local Governments).

<sup>12</sup> Professor Jaffe notes:

[The arteriosclerosis theory] is a very valuable and important theory. When the evil which gives rise to a reform has been somewhat alleviated, the initial dynamism is dispersed. There is a newly evolved status quo. It requires an exceptional effort of concern and attention to maintain human energies at high pitch, to keep courage screwed to the sticking point. Only a limited number of urgent problems can enlist this effort at any one time; the remaining problems must be handled on a routine, stand-by basis until the status quo once more becomes intolerable.

Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1109 (1954).

<sup>13</sup> See generally Lazarus & Onek, *The Regulators and the People*, 57 VA. L. REV. 1069 (1971); Moore, *Recycling the Regulatory Agencies*, 32 PUB. ADMIN. REV. 291, 295 (1972).

Liberal support, especially at the federal level, is a result of the fiscal straitjacket of uncontrollable or previously committed spending.<sup>14</sup> Conservatives see sunset legislation as a way of controlling big government.<sup>15</sup> In addition, legislators view sunset statutes as self-disciplinary measures to check more effectively the rapidly expanding power of the executive branch.<sup>16</sup>

This note suggests that sunset legislation is an appropriate response to these concerns. Section I describes the deficiencies of current methods by which the legislature reviews activities of the executive branch. Section II examines the provisions of sunset legislation, emphasizing the role of evaluation criteria, and suggests that elaborate quantitative techniques are not crucial for adequate evaluation. Evaluation criteria currently incorporated in various sunset statutes can best be classified according to those which apply to entity functioning and those which evaluate an entity's purpose. These criteria are treated in sections III and IV respectively.

## I. TRADITIONAL OVERSIGHT

Sunset legislation does not expand existing legislative oversight powers.<sup>17</sup> Such legislation instead should be viewed as a procedural reform of

<sup>14</sup> Uncontrolled spending rose from 93 billion dollars in 1967 to 303 billion in fiscal year 1977. As a result, actual program levels and discretionary spending have been disproportionately underfunded. 1976 *Hearings on S. 2925*, *supra* note 10, at 26 (statement of Allen Schick).

<sup>15</sup> Senator Goldwater has stated that "the need for a sunset law is obvious. Government spending has become too burdensome and fiscally irresponsible . . . . It is urgent that we try to get a handle on the bureaucracy. We in Congress have simply not been as responsible as we should have been." 1977 *Hearings on S. 2*, *supra* note 8, at 132.

<sup>16</sup> Congress has recently begun to assert additional influence on executive power. The War Powers Resolution of 1973, 50 U.S.C. § 1541 (Supp. V 1975), limited presidential authority unilaterally to commit combat forces without congressional consent. The Congressional Budget and Impounding Control Act of 1974, 31 U.S.C. § 1400 (Supp. V 1975), required that a comprehensive congressional budget statement precede the appropriations process in order to eliminate previously disorganized spending patterns and exert congressional influence in the budgetmaking process.

In his remarks opening the hearings on S. 2, Senator Muskie, a sponsor of the bill, said, "[S]unset is a necessary follow-up to congressional budget reform which has proven itself so well in its first years. . . . Sunset can help us take a closer look at components of that budget—agencies and programs that are the building blocks of national priorities." 1977 *Hearings on S. 2*, *supra* note 8, at 2. *But cf.* Senator Russell Long's statement:

[The] sunset bill would eliminate the possibility of ever having a "permanent program" with the exception of social security and a few other trust fund programs. . . . It would result in a weakening of the powers of Congress—and in the granting of a substantially increased measure of power to the President and to those holding positions which are contrary to the will of a majority of the Congress.

1977 *Hearings on S. 2*, *supra* note 8, at 263-64.

<sup>17</sup> Oversight can be defined as the projection of legislative influence on independent and executive administrative and regulatory entities. Oversight is constitutionally based on congressional power to make policy and draft legislation. *See generally* H. READ, J. MACDONALD, J. FORDHAM, & W. PIERCE, *MATERIALS ON LEGISLATION* 318-21 (3d ed. 1973). The Legislative Reorganization Act of 1946 required each standing committee to

existing oversight methods.<sup>18</sup> The hit-and-miss supervision of governmental entities characteristic of existing oversight results largely from discretionary review and substantial legislative indifference. This discretion is an even larger factor for indirect oversight which is performed by small subcommittees or individual legislators.

### *A. Direct Oversight Methods*

Direct oversight methods project legislative influence over governmental entities in an overt, organizational manner. Such formal oversight occurs at various points in the legislative process and includes appropriations, controls over personnel, investigations, the legislative veto, and information reporting requirements.

The most significant oversight method is the appropriations process. Since unacceptable budgetary items are either not funded or modified, the appropriations power provides a direct check on administrative entities. In addition, appropriations hearings provide legislators with an opportunity to raise concerns about program administration and agency management.<sup>19</sup> The process, however, tends to be compromised "by a fundamental role conflict for some legislators who desire rationality, efficiency, and economy in the abstract, but more expenditures and projects for their state or district in concrete situations."<sup>20</sup> Moreover, the process tends to focus on the incremental increases requested by the agency, rather than on the entire authorization.<sup>21</sup> Thus, appropriations committees rarely

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"exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee." Legislative Reorganization Act of 1946, Stat. 79-753 § 136. *See also* the following portion of the 1974 Budget and Impoundment Act:

The Committees on the Budget of the House of Representatives and the Senate shall study on a continuing basis proposals designed to improve and facilitate methods of congressional budgetmaking. The proposals to be studied shall include but are not limited to, proposals for

(1) improving the information base required for determining the effectiveness of new programs by such means as pilot testing survey research, and other experimental and analytical techniques;

(2) improving analytical and systematic evaluation of the effectiveness of existing programs;

(3) establishing maximum and minimum time limitations for program authorization; and

(4) developing techniques of human resource accounting and other means of providing non-economic as well as economic evaluation measures.

31 U.S.C. § 1303(a) (Supp. V 1975).

<sup>18</sup> *See* text accompanying notes 46-48 *infra*.

<sup>19</sup> W. MORROW, CONGRESSIONAL COMMITTEES 162-63 (1969). For thorough analyses of the appropriations process, *see generally* R. FENNO, THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS (1966); A. WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (1964).

<sup>20</sup> W. KEEFE & M. OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES 446 (2d ed. 1968).

<sup>21</sup> In explaining this situation, Professor Wildavsky writes:

It is much easier to agree on a small addition or decrease than to compare the worth of one program to that of all others. Conflict is reduced by an incremental approach because the area open to dispute is reduced. Agreement comes much more readily when the items in dispute can be treated as differences in dollars instead of as basic

complete a thorough review of existing programs and funding levels. Finally, the cost-conscious appropriations process is inherently unsuitable for substantive review of agency actions.<sup>22</sup> Committees are preoccupied with minimizing costs and have inadequate time or staff resources to review the need for an existing program or to determine if better alternatives exist.

Legislative influence also may be exercised through controls on administrative personnel, which include powers to confirm executive nominations and to remove officials through impeachment.<sup>23</sup> These powers can be used to insure that legislative policies are carried out by the executive branch. Personnel selection, however, tends to be a function of political expediency rather than merit.<sup>24</sup> At the national level, for example, senatorial courtesy gives a senator of the President's party veto power over federal appointments for positions in his state. In addition, legislators are unwilling to take the extreme steps of nonconfirmation or impeachment for all but egregious cases.<sup>25</sup> As a result it is hardly surprising that thorough policy reviews seldom take place.

One of the most dramatic but infrequently utilized forms of direct legislative oversight is investigation. Investigative oversight is generally accomplished by standing committees although special committees are sometimes formed.<sup>26</sup> Expansive subpoena and contempt powers and the ability to grant witnesses immunity from prosecution define the outer boundaries of investigative oversight,<sup>27</sup> but these powers rarely need to be used. Investigative oversight typically involves a simple request by the standing committee to the agency and other relevant parties to make a statement and answer questions about a particular program at a public

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differences in policy; calculating budgets in monetary increments facilitates bargaining and logrolling. It becomes possible to swap an increase here for a decrease there or for an increase elsewhere without always having to consider the ultimate desirability of programs blatantly in competition.

Wildavsky, *Toward a Radical Incrementalism: A Proposal to Aid Congress in Reform of the Budgetary Process*, in CONGRESS: THE FIRST BRANCH OF GOVERNMENT 136 (A. de Grazia ed. 1967).

<sup>22</sup> See T. LOWI, *supra* note 1, at 309 (1969).

<sup>23</sup> From 1947 to 1963, the Senate refused to confirm about one percent of presidential nominations and candidates for promotion. W. KEEFE & M. OGUL, *supra* note 20, at 432 (2d ed. 1968).

<sup>24</sup> *But see id.* at 431. First, Second, and Third Class Postmasters are chosen according to "rule of three" provisions in which the selection is made from among the top three eligible candidates.

<sup>25</sup> For an account of the effort required to mobilize opposition to the nomination of G. Harold Carswell to the Supreme Court, see R. HARRIS, *DECISION* (1971).

<sup>26</sup> The legislator proposing investigation customarily is offered the chairmanship of the special investigatory committee. This practice "may make an impartial inquiry most difficult, for it is not immediately clear that a man who stimulates an investigation is the best person to conduct it." L. RIESELBACH, *CONGRESSIONAL POLITICS* 313 n.22 (1973).

<sup>27</sup> The Supreme Court ruled in *McGrain v. Daugherty*, 273 U.S. 135 (1927) and in *United States v. Norris*, 300 U.S. 564 (1936) that Congress may investigate to obtain information to be used in the exercise of its constitutional powers. See generally H. READ, J. MACDONALD, J. FORDHAM, & W. PIERCE, *supra* note 17, at 318-424 (3d ed. 1973).

hearing. The threat of such a hearing may in itself produce the action or information desired by the committee or persuade agencies to conform the administration of other programs to the wishes of the committee.<sup>28</sup> Many legislators resort to public hearings only after informal proceedings have been unsuccessful because public excoriation may have counter-productive effects on the agency under investigation.<sup>29</sup> Investigative oversight is thus by nature discretionary. Its fatal flaw is that the scope and thoroughness of review vary greatly from committee to committee.

The most controversial form of oversight is the legislative veto which subjects administrative regulations to prior review or veto by resolution of the legislature or, in some cases, the responsible standing committee.<sup>30</sup> In Congress, the legislative veto was limited originally to executive reorganization plans, but later was applied to such areas as defense, atomic energy, and trade.<sup>31</sup> Various states have adopted similar measures.<sup>32</sup> The legislative veto raises significant constitutional questions, however.<sup>33</sup> In addition, it may weaken executive authority, relax administrative accountability by dividing responsibility between agencies and legislative committees, over-involve individual legislators in administrative decisions, and overburden already limited legislative and administrative staffs.<sup>34</sup>

The legislative veto is similar to requirements that entities periodically submit reports of their performance for legislative review. The reports provide information, improve legislative-executive communications, and, at least theoretically, stimulate agency self-analysis.<sup>35</sup> The number of required reports has grown significantly.<sup>36</sup> These reports, however, may

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<sup>28</sup> Some legislators, however, prefer formal hearings because a formal record is prepared. M. OGUL, CONGRESS OVERSEES THE BUREAUCRACY 161 (1976).

<sup>29</sup> *Id.* at 161-62.

<sup>30</sup> See generally W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 125-27 (6th ed. 1974); J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 204-48, 282-84 (1964); L. RIESELBACH, *supra* note 26, at 301-03 (1973).

<sup>31</sup> For example, an amendment to the Atomic Energy Act of 1954, 42 U.S.C. § 2153 (1970), authorizes the President to enter into international agreements concerning exchanges of military information and atomic energy materials. The agreements must, however, be submitted to Congress 60 days before taking effect and are subject to change by concurrent resolution. See J. HARRIS, *supra* note 30, at 206-13 (1964).

<sup>32</sup> W. GELLHORN & C. BYSE, *supra* note 30, at 123-25 (6th ed. 1974).

<sup>33</sup> See J. HARRIS, *supra* note 30, at 238-48, 282-84 (1964); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U.L. REV. 455 (1977). Three constitutional issues are generally cited: congressional infringement on the presidential veto power in that the President cannot override a legislative veto, violation of the constitutionally established legislative process by attachment of conditions to legislation, and infringement on the separation of powers.

<sup>34</sup> J. HARRIS, *supra* note 30, at 245-48 (1964).

<sup>35</sup> M. OGUL, *supra* note 28, at 176 (1976).

<sup>36</sup> At the federal level, for example, 460 reports were submitted by various agencies in 1969. H.R. Doc. No. 31, 91st Cong., 1st Sess. (1969), *quoted in* M. OGUL, *supra* note 28, at 177.

contain self-serving and somewhat misleading information and are received with indifference by legislators.<sup>37</sup>

### *B. Indirect Oversight Methods*

Direct review procedures do not constitute the only available oversight mechanisms. Professional and social contacts between legislators, legislative staff, and agency personnel lead to a variety of indirect oversight methods, including casework and support for administrative management techniques.

Casework involves direct intervention on behalf of constituents who have problems with administrative agencies and occupies a very large part of legislative staff time.<sup>38</sup> In this ad hoc way, individual legislators and their staffs continuously test bureaucratic responsiveness and learn about small slices of administrative policy. Collectively these impressions and interactions may constitute a form of oversight. Apart from its lack of impartiality, however, casework is too result-oriented. As with the appropriations process, casework only irregularly leads to thorough analysis of bureaucratic procedures or reexamination of the need for governmental entities.<sup>39</sup>

Administrative entities periodically adopt management techniques to assist in budgetmaking and internal evaluation. These techniques may be described as a form of oversight because legislatures often initiate or review them. The information produced by such analysis is made available to the legislature and may be used to evaluate the efficiency and cost-effectiveness of administrative entities. Although such previously used management techniques as Planning, Programming Budget Systems (PPBS)<sup>40</sup> and Management by Objective (MBO)<sup>41</sup> are no longer in wide-

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<sup>37</sup> After studying several House and Senate committees, Professor Ogul reports that congressmen and their staffs have no "systematic procedure for preserving and filing executive reports as received." Unless staff members have a prior interest in the subject of a report, moreover, it is in all likelihood not read. M. OGUL, *supra* note 28, at 177-78.

<sup>38</sup> *Id.* at 162-65.

<sup>39</sup> Professor Ogul asked forty-one congressmen, "How frequently does casework lead to an investigation or to the introduction of legislation?" Of the twenty-six respondents, thirteen said "seldom," four answered "from time to time," eight responded "frequently," and one said "usually or normally." *Id.* at 168-69.

<sup>40</sup> PPBS is a system of comparing policies which are related to a common objective for cost and effectiveness. Once an adjustment is made in the administrative structure, many other adjustments must be made because everything is by definition interrelated. PPBS fared poorly in federal experiments in the 1960's. It has been criticised for increasing bureaucratic rigidity because it furnishes a powerful incentive not to do anything. See *Hearings on Zero-Base Budget Legislation Before the Task Force on Budget Process of the House Comm. on the Budget*, 94th Cong., 2d Sess. 121-31 (1976) (statement of Professor Aaron Wildavsky) [hereinafter cited as 1976 ZBB Hearings].

<sup>41</sup> "The idea behind . . . MBO is that objectives should be specified, and that management and workers should agree on the results by which workers are to be judged in accordance with these objectives." *Id.* at 123. This management technique has also been criticised primarily on the grounds that the objective formulation process eventually becomes an end instead of a means to sharpen organization performance. *Id.* at 123-24.



spread use, Zero-Base Budgeting has received much recent attention.<sup>42</sup> All of these techniques, however, are essentially internal, executive devices and place few burdens on the legislature.

### *C. Defects of Traditional Oversight*

The weakness of individual oversight methods does not necessarily mean that oversight techniques are collectively inadequate.<sup>43</sup> The recent surge of sunset legislation, however, indicates that traditional oversight has not been effective. One explanation is that, with the exception of casework, legislators see little political value in oversight activity.<sup>44</sup> Many interests compete for legislators' time, and the public too often seems satisfied that establishing an agency or commission means the problem is solved. Moreover, policy termination is difficult to accomplish because it implicitly admits past error, risks tough political fights with vested interests, and is not visible enough to garner public support. "The result is a self-fulfilling prophecy. Public policies are rarely terminated because so few people try. Few people try because termination efforts are rarely successful."<sup>45</sup>

Sunset statutes neither moot nor preempt the use of traditional oversight methods. For example, entities can still be investigated between review cycles. Sunset legislation reorders present political realities, however, by making failure to complete oversight very visible: the entity due for review ceases to exist and the legislature is presumably held responsible. In addition to removing the discretion of whether or not to perform oversight, sunset legislation provides a systematic review process. This organizing function is stressed in the preamble to the Colorado Sunset Act of 1976:

The general assembly finds that state government actions have produced a substantial increase in numbers of agencies, growth of programs, and proliferation of rules and regulations and that the whole process developed without sufficient legislative oversight, regulatory accountability, or a system of checks and bal-

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<sup>42</sup> Zero-Base Budgeting apparently has been successful in Georgia but not in New Mexico or the U.S. Department of Agriculture. Initially "program elements" are evaluated by their administrators. Each evaluation requires projecting the impact of funding increases, cuts, and terminations. The result is a budget process theoretically free from the incremental psychology that plagues current methods. See generally P. PHYRR, ZERO-BASE BUDGETING: A PRACTICAL MANAGEMENT TOOL FOR EVALUATING EXPENSES (1973); SENATE COMM. ON GOVERNMENT AFFAIRS, 95TH CONG., 1ST SESS., COMPENDIUM OF MATERIALS ON ZERO-BASE BUDGETING IN THE STATES (Comm. Print 1977).

<sup>43</sup> Professor Ogul concludes from his study of various congressional committees that oversight generally is "intermittent and noncomprehensive." M. OGUL, *supra* note 28, at 180 (1976).

<sup>44</sup> One study involved interviewing twenty-three Congressmen, twenty of whom indicated "they considered committee review of agency activity a time-expensive, low-priority concern except when there was likely to be something 'big' in it." Scher, *Conditions for Legislative Control*, 25 J. OF POL. 526 (1963). For an exposition of the thesis that Congressmen's actions are functions of reelection goals, see D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

<sup>45</sup> 1977 *Hearings on S. 2*, *supra* note 8, at 344-45 (statement of Robert D. Behn, Institute of Policy Sciences, Duke University).

ances. The general assembly further finds that by establishing a system for the termination, continuation, or reestablishment of such agencies, it will be in a better position to evaluate the need for the continued existence of existing and future regulatory bodies.<sup>46</sup>

Sunset legislation supplements the substantive elements of existing oversight methods in only a few respects. In most sunset schemes, governmental entities must submit considerable information to evaluating committees.<sup>47</sup> In addition, where Zero-Base Budgeting is used as a management technique, sunset legislation broadens the scope of evaluation. Zero-Base Budgeting is only applicable to those governmental entities which react to funding differentials in an elastic manner.<sup>48</sup> Sunset statutes, however, also apply to entities which spend little money but have considerable economic impact.<sup>49</sup>

## II. SUNSET LEGISLATION

The fulfillment of promises to improve oversight will depend on the scope, procedures, and particularly the evaluation criteria of sunset statutes.

### A. Description

1. *Scope*—The range of administrative entities affected by sunset legislation varies substantially. Some states specify by name the administrative entities that will be reviewed.<sup>50</sup> More frequently, however, the statutes define a broad category of entities that will be subject to evaluation, in addition to certain specifically named activities.<sup>51</sup> Generally, governmental entities are divided according to whether or not they perform a regulatory function. Limiting the scope of sunset statutes to regulatory

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<sup>46</sup> COLO. REV. STAT. § 24-34-104(1) (Supp. 1977).

<sup>47</sup> Thus the Maine Sunset Act requires each entity under review to submit a justification report to the Legislature. The report must include a description of each program, activity, and advisory body within the entity undergoing review, complete budget statement, an identification of other public and private "programs and activities having the same, similar or complementary objectives," and an analysis of past and future objective accomplishment. ME. REV. STAT. tit. 3, § 504 (Supp. 1977).

<sup>48</sup> Thus a meaningful Zero-Base Budgeting analysis requires that different funding levels produce different levels of agency performance.

<sup>49</sup> Some governmental bodies are likely to have roughly similar impacts over a wide range of funding levels. For example, regulatory commissions have considerable economic impact, yet it is unclear that their impacts would be significantly affected by funding cuts. *But see* Note, *Zero-Base Sunset Review*, 14 HARV. J. LEGIS. 505 (1978), proposing sunset legislation which applies Zero-Base Budgeting techniques to regulatory agencies.

<sup>50</sup> *See, e.g.*, TENN. CODE ANN. § 4-2903-8 (Supp. 1977).

<sup>51</sup> *See, e.g.*, ALA. CODE tit. 41, § 20-2(2) (Supp. 1977), which defines "agency" to "include all departments, divisions, bureaus, commissions, councils and boards, or like

commissions and licensing boards has advantages in terms of ease of evaluation,<sup>52</sup> and is especially convenient for jurisdictions interested in trying sunset on an experimental basis.<sup>53</sup> In addition, engaging in too much oversight too quickly may lead to superficial, unenlightening evaluations and legislative disenchantment with systematic oversight. On the other hand, limiting scope may effectively exclude unaffected entities from any oversight. Moreover, states which also apply sunset to departments and administrative agencies<sup>54</sup> are likely to realize greater savings because those entities consume larger portions of state budgets than do regulatory bodies.

The proposed federal Program Evaluation Act of 1977 (S. 2)<sup>55</sup> excludes regulatory commissions from the review schedule.<sup>56</sup> S. 2 applies to all other federal programs except those funded through trust funds and those which support litigation or enforce judgments involving civil rights.<sup>57</sup> An attempt to include tax expenditures (deductions, credits, and exemptions) in the review schedule was rejected in committee.<sup>58</sup> A unique feature of S. 2 is that it provides flexibility to the committees to determine the scope of review. Consequently "what is considered as a program by one authorizing committee may be considered as several programs by another committee, or as sub-program elements by yet another."<sup>59</sup> S. 2 also allows Congress to choose federal activities of particular interest for more in-depth reviews.<sup>60</sup> The result is an ad hoc approach which makes optimal use of committee staff resources and allows selection of entities which are

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governmental units or subunits of the State of Alabama, regulatory in nature or otherwise."

<sup>52</sup> See text accompanying notes 90-95 *infra*.

<sup>53</sup> Thus 1977 S.D. Sess. Laws ch. 3, § 2, at 25 simply lists eight state regulatory functions which would terminate on June 30, 1978, absent legislative review.

<sup>54</sup> See, e.g., ALASKA STAT. § 44.66.010 (Supp. 1977).

<sup>55</sup> S. 2, 95th Cong., 1st Sess. (1977).

<sup>56</sup> The proposed Regulatory Reform Act of 1977 (S. 600) is designed to focus on such commissions. Sponsored by Senator Percy, S. 600 requires the President to submit reforms regarding the various regulatory functions to Congress on a scheduled basis. The Congress must draft its own plans if these reforms are not submitted. The Comptroller General and the Congressional Budget Office are directed to submit reports evaluating the regulatory agencies. If no regulatory reform legislation is passed by fixed dates, the agencies are terminated piecemeal. First, their authority to make new rules not essential for public health and safety is removed. Second, their power to enforce nonessential rules is abolished. Third, if legislation has not yet passed, the agencies themselves are abolished and the enforcement of essential rules passes to the Justice Department. See *Digest of Public General Bills and Resolutions, 95th Cong., 1st Sess.,* [1977] CONG. RES. SERV., no. 1, pt. 1 at A-66.

<sup>57</sup> S. 2, 95th Cong., 1st Sess. § 101(b)(4), (5) (1977).

<sup>58</sup> S. REP. NO. 95-326, 95th Cong., 1st Sess. 10 (1977). Treasury Secretary Blumenthal opposed the review of tax expenditures. Tax expenditures are difficult to define, he said, and the fact that tax provisions are so interrelated would mean that periodic review and change would have unforeseen results. In addition, because tax expenditures often arise through IRS rulings rather than legislative acts, terminating them would require very detailed legislation. 1977 *Hearings on S. 2, supra* note 8, at 107.

<sup>59</sup> S. REP. NO. 95-326, 95th Cong., 1st Sess. 8 (1977).

<sup>60</sup> Several factors would be considered in selecting programs for review. These include: the extent to which substantial time has passed since a program has been in effect; the extent to which a program area appears to require significant change; the resources of the committee with a view toward undertaking such evaluation across a broad range of program areas; and the desirability of examining related programs in depth in [the] same year.

S. 2, 95th Cong., 1st Sess. § 302(b) (1977).

ripe for review. Inasmuch as such flexibility could lead to relatively cursory reviews of vast program aggregates, however, it is similar to the inadequate discretionary oversight which sunset legislation is designed to replace.

The scope of each sunset act should be directly related to availability of legislative resources, particularly staff time, for use in oversight. Entity reporting requirements in sunset statutes may not result in the provision of full or accurate information.<sup>61</sup> Yet reluctance to rely on such reports, thus putting a greater investigative burden on committee staffs, would be prohibitively expensive. Probably the best system would include staff spot-checking to insure submitted information was accurate. Ultimately, evaluation costs must be balanced against the resulting savings,<sup>62</sup> and this suggests that the scope of sunset statutes should be reviewed periodically.<sup>63</sup>

2. *Procedures*—Sunset legislation involves several important procedural questions, including the length of the review cycle, the primary legislative evaluating body, and the rights and duties of a terminated entity. The same considerations affecting the scope of review will also influence its frequency. A legislature concerned about overloading itself is likely to stretch the review cycle over a longer period. Most review cycles run from four to six years<sup>64</sup> and provide little opportunity for schedule revision. This inflexibility is designed to allow simultaneous review of similar entities, reducing duplication of effort and evaluation costs, and enhancing the action-forcing effect of sunset. A fixed schedule also gives newly created agencies a breathing period to establish themselves before being required to weather legislative oversight.<sup>65</sup> Some programs, such as fusion research and education grants, may not yield

<sup>61</sup> Thus one critic notes:

Sunset legislation could bring into existence a defense of the status quo . . . . Basically, this could happen if the operators and clients of now loosely related and partially competitive programs found themselves forced into a more united and forceful coalition by virtue of the now common greater threat . . . . Rather than searching for ways of successfully drawing down budgets or ending programs, such coalitions search for ways of protecting and securing their present status and program mix. Persons are rewarded for suppressing information about program weaknesses or vulnerabilities in such contexts.

1977 *Hearings on S. 2*, *supra* note 8, at 340 (statement of Robert P. Biller, Dean, School of Public Administration, University of Southern California).

<sup>62</sup> For an account of a General Accounting Office study of the savings resulting from some of its program evaluations, see 1976 *Hearings on S. 225*, *supra* note 10, at 132-54.

<sup>63</sup> ME. REV. STAT. tit. 3, § 511 (Supp. 1977) and 1977 Neb. Laws no. 257, § 14, at 835 provide for the automatic termination of sunset legislation unless the legislature reenacts it.

<sup>64</sup> See, e.g., LA. REV. STAT. ANN. § 49.193(C) (West Supp. 1977) (four years); Reorganization of Executive Branch of State Government, 1977 Conn. Legis. Serv. act 77-614, § 581, at 1548 (five years); ARK. STAT. ANN. § 5-1201 (Supp. 1977) (six years). But see ME. REV. STAT. tit. 3, § 506.2 (Supp. 1977) (requiring that any independent agency not specifically covered in the Maine Sunset Act be reviewed at least every ten years).

<sup>65</sup> 1977 *Hearings on S. 2*, *supra* note 8, at 19-22. All enacted sunset legislation would permit earlier-than-scheduled legislative evaluations. A fixed review schedule may prolong the lives of entities that would have been terminated but for sunset, however, because unscheduled activities may not be reviewed. See 1976 *Hearings on S. 225*, *supra* note 10, at 263 (statement of Senator Byrd).

information which can be meaningfully evaluated on the review cycle. S. 2 permits Congress some flexibility in selecting program areas within the current review schedule for evaluation,<sup>66</sup> and thereby implicitly permits some flexibility in altering the review cycle. This modification, however, compromises the action-forcing mechanism and may ultimately be counterproductive.

Sunset statutes typically require an entity scheduled for review to be evaluated by an intermediate body before its future is decided on the legislative floor. The standing committee with jurisdiction over the entity frequently conducts the initial evaluation.<sup>67</sup> The entity will often be required to submit reports detailing its past accomplishments, budgetary expenditures, and future plans.<sup>68</sup> The committee then submits its recommendations in the form of a bill.<sup>69</sup> A terminated entity is allowed a six to twelve month wrap-up period to finish pending business.<sup>70</sup>

All statutes provide that existing legal claims against the entity not be dismissed on grounds of termination. Some states permit the regulations and underlying statutory authority of an entity to continue after termination.<sup>71</sup> Other states do not permit continuation, not only because it seems anomalous, but also because it raises the possibility of later punishment for failure to comply with regulations that were not being enforced at the time of violation.<sup>72</sup> Reestablishment would thus require reenactment of all authorizing legislation.

<sup>66</sup> See note 59 *supra*.

<sup>67</sup> See, e.g., GA. CODE ANN. § 84-104b (Supp. 1977). Other states use a variety of bodies to conduct the initial evaluation. See ME. REV. STAT. tit. 3, § 505 (Supp. 1977) (state auditor's office); TENN. CODE ANN. § 4-2909 (Supp. 1977) (joint committees); MONT. REV. CODES ANN. § 82-4604 (Supp. 1977) (special audit committees); 1977 N.C. Adv. Legis. Serv. ch. 712, § 6, at 477 (evaluation commission which includes members of the public). A proposed New York sunset statute puts termination power into the hands of a commission composed of legislators of both parties and public representatives. The commission's recommendation could be overruled by either house of the legislature. Such legislation poses serious constitutional delegation of power questions. *Steingut Proposes 'Sunset' Law to Regulate New York Agencies*, N.Y. Times, Apr. 25, 1977, at 34, col. 1.

<sup>68</sup> See note 46 *supra*.

<sup>69</sup> The evaluating committee generally may recommend that the entity be continued, that its structure or function be changed in some way, or that it be terminated. Committee inaction operates as a recommendation for termination. See, e.g., ARK. STAT. ANN. § 5-1211 (Supp. 1977).

<sup>70</sup> See, e.g., ALA. CODE tit. 41, § 20-12 (Supp. 1977) (six months); New Mexico Sunset Law, 1977 N.M. Laws ch. 259, § 7, at 2045 (one year).

<sup>71</sup> Compare the Arkansas Sunset Act which provides:

In the event an agency shall cease to exist pursuant to this Act . . . the laws governing its powers, duties, and functions are not repealed, but shall be administered by some other State agency, if so designated by the General Assembly, unless the General Assembly specifically repealed the laws establishing such powers, duties, and functions.

with Connecticut's Reorganization of Executive Branch of State Government, Pub. Act 77-614, § 580:

Upon the expiration of the one year period, the entity or program shall cease all activities; all regulations promulgated by the entity or pursuant to the program shall cease to exist, and all unexpended balances of appropriations or other funds shall revert to the fund from which they were appropriated, or if that fund is abolished, to the general fund.

1977 Conn. Legis. Serv. 1547.

<sup>72</sup> See *Government Economy and Spending Reform Act of 1976: Hearings on S. 2925*

3. *Evaluation Criteria*—All sunset statutes contain evaluation criteria for the review of governmental entities. Some criteria apply to the way an entity functions; others help measure the need or purpose of an activity. Although most sunset acts include evaluation criteria applicable to function and purpose, none call attention to the significance of the distinction even if the criteria are clearly divided.<sup>73</sup> Evaluation of function and purpose are independent processes and must be clearly distinguished in decisionmaking. Terminating an entity because it functions poorly is usually unjustifiable because termination should hinge on the merits of an entity's underlying purpose.<sup>74</sup> Moreover, organizing an evaluation around these two key questions simplifies both the review and drafting recommendations.

### *B. The Importance of Criteria*

The effectiveness of sunset review will be a direct function of the evaluation methods used. Evaluation criteria not only determine the fate of governmental entities, but also provide an indication of legislative commitment to oversight. For example, it will be difficult for a reviewing committee to ignore specific statutory language calling for a determination of whether an "agency has operated in an open and accountable manner, with public access to records and meetings and safeguards against conflicts of interest and undue lobbying pressures."<sup>75</sup> Sunset acts not incorporating such explicit directions<sup>76</sup> are less likely to be effective. Evaluation criteria thus identify specific areas of legislative concern. They also put governmental entities on notice as to how their programs and policies will be judged and what specific actions should be taken to satisfy the legislative watchdog.

1. *Sophisticated*<sup>77</sup> *Quantitative Evaluation*—Cost-benefit analysis<sup>78</sup> has been posed as an important method of evaluation. It is, however, of limited usefulness as a means to judge the effectiveness of governmental entities, primarily because it is extremely difficult to postulate<sup>79</sup> and

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*Before the Senate Comm. on Rules and Administration*, 94th Cong., 2d Sess., 47 (1976) (question from Senator Williams' staff).

<sup>73</sup> Only three states clearly divide on these lines, and they call no attention to the distinction. ALA. CODE tit. 41, §§ 20-7, 20-8 (Supp. 1977) is confusing on this point. Section 8, which contains evaluation criteria applicable to the way entities function, is said to apply to "whether a sufficient public need for continuance is present." Such language would seem to be more directed at purpose. See also ALASKA STAT. § 44.66.050 (Supp. 1977) and the Washington Sunset Act of 1977, 1977 Wash. Laws ch. 289, § 1, at 861.

<sup>74</sup> It is, however, possible to conceive of a situation so egregious that it would be wiser to cut all ties with the past and establish a new governmental body.

<sup>75</sup> 1977 Neb. Laws no. 257, § 10(k), at 834.

<sup>76</sup> For example, the Louisiana sunset legislation only contains three general evaluation criteria. LA. REV. STAT. ANN. § 49.193(B) (West Supp. 1977).

<sup>77</sup> For the purposes of this note, "sophisticated" indicates the amount of mathematical skill required to perform the evaluation.

<sup>78</sup> Cost-benefit analysis may be defined most simply as the comparison (usually in numerical or economic terms) of projected benefits of an activity with its anticipated costs. See generally E. MISHAN, COST-BENEFIT ANALYSIS (1971).

<sup>79</sup> One commentator notes:

Identifying costs means selecting some and excluding others. Judicious selection of

assign values to<sup>80</sup> the relevant costs and benefits.<sup>81</sup> Far from providing a hard, neutral answer, cost-benefit analysis all too often produces results which are functions of definitional bias and manipulation. Furthermore, the legislature may be forced to rely on the governmental entity it is evaluating for interpretation of the analysis. Although some evaluation criteria require information produced by cost-benefit techniques,<sup>82</sup> many others do not.<sup>83</sup> It is possible to accomplish much sunset oversight without the legions of calculator-toting technicians that sunset critics fear are necessary.<sup>84</sup>

Cost-benefit analysis is not likely to be of great value to legislators. Legislators and their staffs generally do not possess the technical skills necessary for meaningful evaluation of quantitative results.<sup>85</sup> Of greater importance, however, is the fact that legislative decisions are ultimately based on subjective or political judgments. Cost-benefit analysis may provide useful information to legislators, but it will not replace considered political decisions.

2. *Evaluation Not Requiring Sophistication*—Evaluation methods which legislators can easily apply provide the most important inputs to sunset reviews. The standard by which entities will be judged is the crucial element in any evaluation method, since it provides legislators with a basic framework for analysis. Two examples<sup>86</sup> illustrate the importance of evaluation criteria incorporated in sunset legislation, especially where sophisticated evaluation methods are not employed.

In the first Alabama sunset review, the joint legislative committee charged with initial evaluation was unable to finish formal evaluation reports because of its enormous workload. The legislators subsequently completed review with debate on each agency's future limited to two hours.<sup>87</sup> Evaluation criteria incorporated in the Sunset Act were con-

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certain costs, to which values are carefully assigned from within a wide range of plausible values, can predetermine the outcome of a cost-risk-benefit analysis. Just as arbitrary selection of certain probabilities of nuclear accident or violence, or exclusion of the nuclear tailings risk, can make any nuclear power station appear more attractive than a non-nuclear one, the arbitrary selection of a price elasticity of demand, or exclusion of some debatable or contingent category of monetary costs, can have the same effect.

Lovins, *Cost-Risk-Benefit Assessments in Energy Policy*, 45 GEO. WASH. L. REV. 911, 930 (1977).

<sup>80</sup> Professor Mishan cites a study of realized benefits which would follow eradication of syphilis: "more than 40 per cent of [the total \$3.1 billion saving] . . . was attributed to 'stigma' which was, somewhat arbitrarily, evaluated at 1 per cent or 0.5 per cent of earnings subsequent to the discovery of syphilis." E. MISHAN, *supra* note 78, at 15.

<sup>81</sup> See generally *Symposium: Risk-Benefit Assessment in Governmental Decision-Making*, 45 GEO. WASH. L. REV. 901 (1977); Note, *The Economic Impact Disclosure Act*, 10 U. MICH. J.L. REF. 566 (1977); Note, *Cost-Benefit Analysis and the National Environmental Policy Act of 1969*, 24 STAN. L. REV. 1092 (1972).

<sup>82</sup> See text accompanying note 113 *infra*.

<sup>83</sup> See text accompanying notes 90-101 *infra*.

<sup>84</sup> See, e.g., S. REP. NO. 95-326, 95th Cong., 1st Sess. 47 (1977) (supplemental views of Senator Thomas Eagleton).

<sup>85</sup> From 1925 to 1947, the predominant occupations of American legislators at both federal and state levels were lawyers, businessmen, and farmers. W. KEEFE & M. OGUL, *supra* note 20, at 124 (1968).

<sup>86</sup> The Alabama and Colorado examples are admittedly extreme; however, Alabama and

sequently the only available standards by which Alabama legislators could apply what little information they had to make decisions.

The Colorado legislature did not need sophisticated evaluation techniques to discover the Colorado Court Stenographers Board's many failings. A four percent stenographer qualification rate,<sup>88</sup> one license revocation in fifty years, and the absence of staff, office, and most records were important pieces of information, answering questions posed by the Colorado Sunset Act's evaluation criteria,<sup>89</sup> but were acquired without cost-benefit analysis.

### III. FUNCTION CRITERIA

#### A. Procedure

Evaluation criteria which focus on the procedural aspects of an entity's performance should be directly related to the scope of the legislation.<sup>90</sup> These criteria are well suited to the more adversary environment of regulatory and licensing bodies because they test the openness and fairness of the decisionmaking process. The procedures of other entities receive less attention, not for lack of importance, but because the spending policies of these agencies are more easily examined and are more visible to legislators.

Procedural criteria are based on the assumption that satisfactory process will lead to satisfactory decisions.<sup>91</sup> These criteria include the expeditious processing of formal complaints,<sup>92</sup> public participation in rule and decisionmaking,<sup>93</sup> and whether the agency provides for adequate feedback from regulated parties on the impacts of its actions.<sup>94</sup> This part of the review can be facilitated by public hearings on the activity under evaluation, and cost-benefit techniques are unnecessary. Some states so provide.<sup>95</sup> The analogous federal practice could be to query state and

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Colorado are among the few states to have actually reviewed governmental entities under a sunset law, primarily because they were among the first to pass such legislation.

<sup>87</sup> See Common Cause, *supra* note 4, at 1.

<sup>88</sup> While the legislature was investigating the Court Stenographers Board, this passing rate shot up to 55%. See 1976 *Hearings on S. 2925*, *supra* note 10, at 63 (statement of Gerald Kopel). This is an indication that oversight will influence agencies even if termination does not actually occur. One Colorado legislator has reported that complaints to his office about regulatory agencies have decreased by more than one-half since enactment of the Colorado Sunset Act. Seib, *Colorado's Prototype Sunset Law Called a Success as Several Agencies are Killed, Merged or Moved*, Wall St. J., Aug. 30, 1977, at 30, col. 1.

<sup>89</sup> COLO. REV. STAT. § 24-34-104 8(b) (Supp. 1977).

<sup>90</sup> The Reorganization of Executive Branch of State Government, 1977 Conn. Legis. Serv. act 77-614, §§ 578, 579, at 1547, is the only sunset act which explicitly divides entities under review into regulatory and nonregulatory groups and applies different sets of evaluation criteria to each.

<sup>91</sup> For an argument that agency procedures provide accuracy, efficiency, and public acceptability see Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585 (1972).

<sup>92</sup> See Washington Sunset Act of 1977, 1977 Wash. Laws ch. 289, § 6(5)(b), at 863.

<sup>93</sup> See 1977 S.D. Sess. Laws ch. 3, § 6(5), at 27.

<sup>94</sup> See 1977 Neb. Laws no. 257, § 10(2)(q), at 834.

<sup>95</sup> See, e.g., 1977 N.C. Adv. Legis. Serv. ch. 712, § 9, at 482-84, which provides detailed instructions for giving notice of and conducting public hearings.



local governments concerning the effectiveness and responsiveness of those agencies which administer federal grants.<sup>96</sup>

### *B. Internal Organization*

Many statutes, regardless of scope, contain evaluation criteria which measure a governmental entity's internal organization and efficiency.<sup>97</sup> These criteria are applicable to both administrative and regulatory bodies. As part of this evaluation, the legislature may be required to examine conflicts of interest among employees,<sup>98</sup> conformance to affirmative action hiring policies,<sup>99</sup> reporting and recordkeeping requirements,<sup>100</sup> and the quality of the activity's input to the sunset evaluation process.<sup>101</sup> Cost-benefit techniques are not required to answer these questions. Information on internal organization can be ascertained, for example, by audits or reporting requirements for minority hiring and conflict of interest purposes. The difficulty of defining "efficiency," however, gives the legislature considerable flexibility in conducting its evaluation. It is likely to be used as a catchall criterion, reaffirming the legislative prerogative to examine any aspect of an entity's operation.<sup>102</sup>

### *C. Accomplishments*

Governmental entity functioning may also be measured by examining accomplishments. Criteria in this category include the achievement of initial objectives,<sup>103</sup> "the extent to which statutory changes have been recommended which would benefit the statutory entity,"<sup>104</sup> and compliance with underlying statutory authority.<sup>105</sup> Some statutes supplement these criteria by requiring a statement of accomplishments and budgetary expenditures.<sup>106</sup> Since regulatory agencies perform different functions

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<sup>96</sup> See 1976 *Hearings on S. 2925*, *supra* note 10, at 296 (statement of New Jersey State Treasurer Leone). State and local government experience with federal funding may provide a good source of information for determining which programs are wasteful and duplicative. Local governments would be especially willing to speak out if they were assured that those funds would not be lost to them. Although S. 2 does not specifically provide for such a survey, any good evaluation of a federal activity dealing with state and local governments should require feedback from them.

<sup>97</sup> See, e.g., 1977 S.D. Sess. Laws ch. 3, § 6(3), at 27 (1977).

<sup>98</sup> See, e.g., TEX. STAT. ANN. art. 5429k, § 1.10(11) (Supp. 1978).

<sup>99</sup> See, e.g., OKLA. STAT. ANN. tit. 74, § 3915(5) (West Supp. 1977). Other statutes, however, use the phrase "equal employment requirements." See 1977 Neb. Laws no. 257, § 10(2)(n), at 834.

<sup>100</sup> See, e.g., 1977 N.C. Adv. Legis. Serv. ch. 712, § 8(8), at 481.

<sup>101</sup> See, e.g., ALA. CODE tit. 41, § 20-7(1) (Supp. 1977).

<sup>102</sup> For an argument that such intense legislative oversight might duplicate and weaken the internal discipline of the Executive Branch rather than strengthening and enforcing it, see J. HARRIS, *supra* note 30, at 13.

<sup>103</sup> See, e.g., TEX. STAT. ANN. art. 5429k, § 1.10(2) (Supp. 1978).

<sup>104</sup> OKLA. STAT. ANN. tit. 74, § 3915(1) (West Supp. 1977).

<sup>105</sup> See, e.g., ARK. STAT. ANN. § 5-1208(b) (Supp. 1977).

<sup>106</sup> See, e.g., S. 2, 95th Cong., 1st Sess. § 303(6) (1977).

than nonregulatory agencies, these criteria may vary with the scope of the statute.<sup>107</sup> Accomplishment criteria for regulatory activities might include; for example, whether a licensing commission has allowed qualified applicants to enter the field.<sup>108</sup>

Crucial to the legislature's ability to evaluate an entity's accomplishments is a statement of entity goals and objectives. Unfortunately, the compromising, consensual nature of the legislative process means agreement on program goals is often absent at authorization.<sup>109</sup> Program objectives, if stated at all, tend to be very broad.<sup>110</sup> Consequently, a determination of failure or success is extremely difficult. The diverse perceptions of those backing the sunset concept itself are examples of this problem.<sup>111</sup> In future evaluations, their opinions of whether sunset statutes will have been successful are likely to be quite different. On the other hand, delineating extremely precise statutory goals is not desirable. Such goals "offer incentives to program officials to focus on the measured goals while neglecting other important aspects of the program,"<sup>112</sup> and may preclude administrators from being flexible enough to tackle obviously related problems. Moreover, too much specificity can lead to premature judgments that an activity was a success or failure.

More sophisticated techniques are required to assess an entity's accomplishments than its procedures or organization. Although cost-benefit analysis sheds light on the effectiveness of an entity's operations, one could, for example, apply the whole panoply of cost-benefit techniques without determining whether educational support programs have been successful. The use of accomplishment criteria is limited by the often erroneous underlying assumption that agency goals are readily ascertainable and internally consistent.<sup>113</sup> As a result, relying on such goals will

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<sup>107</sup> If criteria are phrased in general terms, however, that language will look to accomplishments regardless of specific goals.

<sup>108</sup> See, e.g., COLO. REV. STAT. § 24-34-1048(b)(I) (Supp. 1977).

<sup>109</sup> See 1976 ZBB Hearings, *supra* note 40, at 92 (statement of Phillip S. Hughes, Assistant Comptroller General).

<sup>110</sup> See, e.g., 47 U.S.C. § 151 (1970), delineating the purposes of the Federal Communications Commission:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide and world-wide wire and communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the Federal Communications Commission . . . .

<sup>111</sup> See text accompanying notes 9-13 *supra*.

<sup>112</sup> See 1976 ZBB Hearings, *supra* note 40, at 92 (statement of Phillip S. Hughes, Assistant Comptroller General).

<sup>113</sup> Former budget director Roy Ash has stated:

[One major] problem is where to cut into the circle [the closed circle management model] in an effort to improve its functioning. On many programs . . . that place is not one of an after-the-fact audit of performance but instead the achievement of a much better statement of program objectives in the first place.

1976 Hearings on S. 2925, *supra* note 10, at 16.

lead to a somewhat subjective and impressionistic conclusion of whether an entity has accomplished or is accomplishing its designed purposes. Thus, it is extremely helpful that sunset statutes list criteria which, although not providing definite answers on entity accomplishments, reveal such information as licensing rates, administrative costs, and type of constituency served. Legislators can use such straightforwardly obtained information for making responsible oversight decisions.

Functional evaluations which reveal incompetence or worse should not necessarily result in the termination of the entity. Functional evaluations answer many questions regarding the operation, accomplishments, and costs of an entity, but they do not examine whether it serves, albeit imperfectly, an important purpose. To the extent that the Colorado Board of Court Stenographers was terminated for unsatisfactory licensing and recordkeeping, for example, that action also penalized those whom the Board was designed to protect.

Sunset statutes risk such illogical results by not distinguishing between function and need criteria. Sunset acts ultimately could lead to termination of entities, for example, which had not complied with sunset reporting requirements. Functional criteria, however, should be viewed as a means of improving existing bodies rather than as a basis for termination. This distinction should be made explicit in order to minimize the danger of arbitrary, irrational termination and to reinforce the role of automatic termination as an incentive for the legislature rather than as a club for the bureaucracy.<sup>114</sup>

#### IV. NEED CRITERIA

Determining the need for a governmental entity is the most difficult evaluation problem in sunset. A rough Zero-Base Budgeting approach is one helpful evaluation technique.<sup>115</sup> It involves the difficult task of projecting the impact of changes in or termination of entity funding, and implicitly requires an initial assessment of the entity's present economic,

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<sup>114</sup> See note 128 *infra*.

<sup>115</sup> Most states limit the zero-base approach to determining the impact of dissolution. See, e.g., TENN. CODE ANN. § 4-2912(10) (Supp. 1977). Washington takes a broader view: the "extent to which the absence or *modification* of regulation would adversely affect the public health, safety, or welfare." Washington Sunset Act of 1977, 1977 Wash. Laws ch. 289, § 7(5), at 864 (emphasis added), while Texas takes a narrow approach; "[t]he impact in terms of federal intervention or loss of federal funds if the agency is abolished." TEX. STAT. ANN. art. 5429k, § 1.10(13) (Supp. 1978). But see ALA. CODE tit. 41, § 20-8 (Supp. 1977); LA. REV. STAT. ANN. § 49.193(A) (West Supp. 1977); OKLA. STAT. ANN. tit. 74, § 3914(1) (West Supp. 1977); R.I. GEN. LAWS § 42-67-6(A) (Supp. 1977). These states require the reviewing committee to conduct an explicit zero-base evaluation. S. 2 requires "an analysis of the services which could be provided and performance which could be achieved if the program were continued at a level less than, equal to, or greater than the existing level." S. 2, 95th Cong., 1st Sess., § 303(12) (1977).

health, and safety impacts.<sup>116</sup> The inherent inaccuracies associated with such impact statements<sup>117</sup> are amplified in predictions based on hypothetical funding levels. Indeed, this aspect of sunset legislation would be a particularly good candidate for periodic review.

Several states explicitly require an evaluation of the relationship between the government's police power and the protection of the public by regulatory agencies.<sup>118</sup> Such an evaluation requires a legal background, is subjective, and is likely to be easily reversible by a conflicting legislative definition of "reasonableness."<sup>119</sup> Another approach is to determine whether activities with similar or conflicting missions exist and then to eliminate any conflict or duplication.<sup>120</sup> Other need evaluation criteria include assessments of alternative methods of performing the same services<sup>121</sup> and projections of future activity operations and funding requirements.<sup>122</sup> S. 2 goes so far as to require a proposed date by which the activity will have fulfilled its purpose.<sup>123</sup>

A problem associated with reviewing the need for governmental entities is that well-established, publicly backed programs could be jeopardized by obstinate committee chairmen, filibustering legislators, and veto-happy executives.<sup>124</sup> Some sunset acts try to defuse these problems by requiring public hearings and by granting the governmental entity an extra year after termination to end its operations.<sup>125</sup> The public hearings could put pressure on any antimajoritarian obstacles to reauthorization and the termination period allows a legislative majority time to muster support to save the entity. S. 2 neutralizes most of the procedural traps which would lead to termination by default.<sup>126</sup> Its inability to circumvent the possibility

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<sup>116</sup> The Maine Sunset Act inquires: "Would the absence of regulation significantly harm or endanger the public health, safety or welfare?" and "[d]oes the regulation have the effect of directly or indirectly increasing the costs of any goods or services involved and if so, to what degree?" ME. REV. STAT. tit. 3, § 505(2)(A), (D) (Supp. 1977).

<sup>117</sup> See notes 78-79 *supra* and Note, *The Economic Impact Disclosure Act*, 10 U. MICH. J. L. REF. 566 (1977).

<sup>118</sup> See FLA. STAT. ANN. § 11.61(4)(b) (West Supp. 1977); ME. REV. STAT. tit. 3, § 505(2)(B) (Supp. 1977); MONT. REV. CODES ANN. § 82-4604 (2)(b) (Supp. 1977); 1977 Neb. Laws no. 257, § 10(2)(b), at 833 (1977).

<sup>119</sup> But see 1 F. COOPER, *STATE ADMINISTRATIVE LAW* 31-91 (1965), noting that it is very unlikely that a court would strike down an agency as an unlawful delegation of legislative power.

<sup>120</sup> See 1976 *Hearings on S. 2925*, *supra* note 10, at 125-30 (statement of Elmer B. Staats, Comptroller General). At the national level, funding duplication can be "quite complex and time consuming requiring a comprehensive understanding of multiple Federal programs and activities, relationships among Federal agencies, agencies' relationships with clientele groups, and the operations of grantee organizations." *Id.* at 128. For example, there are 228 programs funding state health activities within the Department of Health, Education and Welfare. Of these, twenty-two apply to mental health. *Id.*

<sup>121</sup> See, e.g., FLA. STAT. ANN. § 11.61(4)(c) (West Supp. 1977).

<sup>122</sup> See, e.g., ME. REV. STAT. tit. 3, § 504 (Supp. 1977).

<sup>123</sup> S. 2, 95th Cong., 1st Sess. § 303(11) (1977).

<sup>124</sup> In the latter case, for example, an activity would need two-thirds support in order to win reauthorization.

<sup>125</sup> See note 69 *supra*.

<sup>126</sup> For example, the bill provides for liberal procedures to discharge reauthorization bills from committees. Such committees must act prior to May 15 of the review year. If no action has taken place, one-fifth of a quorum of the appropriate house may force its discharge. Debate on the discharge is limited to one hour. This procedure contrasts sharply with normal

of presidential veto may represent the price Congress pays for the privilege of disciplining itself through sunset legislation. Since sunset requires automatic termination, Congress must risk veto of any statute reauthorizing a particular entity.

## V. CONCLUSION

Sunset legislation makes several contributions toward improving legislative oversight. Through its action-forcing mechanism of entity termination, legislators are confronted with their oversight duties and compelled to review previous legislative decisions. Review schedules coordinate oversight and help avoid duplication. Evaluation criteria supply governmental entities with legislative policy goals and provide legislators with a framework for conducting oversight. In addition, evaluation criteria insure that legislative policy values rather than the postulates of the systems analyst are the standards of review.

If properly carried out, sunset legislation will effect a dramatic shift in legislative priorities by mandating continuing oversight of the executive branch. By requiring entities to justify themselves,<sup>127</sup> sunset may also create a more adversary relationship between the legislative and executive branches.

This adversary relationship may be counterproductive if bureaucratic communities band together overtly to oppose or covertly to undermine and deceive the review process.<sup>128</sup> Although sunset legislation provides

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House and Senate rules which require majority votes for discharge. S. 2, 95th Cong., 1st Sess., § 505(d) (1977).

<sup>127</sup> See, e.g., ALA. CODE tit. 41, § 20-6(b) (Supp. 1977): "All agencies shall bear the burden of establishing that sufficient public need is present which justifies their continued existence. All agencies shall provide the reviewing and evaluating committee with the following information . . . ." Other states which specifically require the activity being reviewed to justify its further existence include Alaska, Colorado, Connecticut, Montana (once the legislative audit committee has recommended termination), New Mexico, North Carolina, Oklahoma, South Dakota, Arkansas, Tennessee, and Louisiana. The apparent justification for imposing this burden is that it is much easier for governmental activities to defeat attempts to abolish them than it is for them affirmatively to win reauthorization. 1976 *Hearings on S. 2925*, *supra* note 10, at 62 (statement of Colorado Legislator Gerald Kopel).

<sup>128</sup> Thus, in this early period of sunset history, there are already signs of vested interest opposition. For example, at the federal level, veteran's organizations are opposing any review of Veteran's Administration programs. See, e.g., 1977 *Hearings on S. 2*, *supra* note 8, at 446 (statement of Donald H. Schwab). In Colorado, court stenographers mounted a very vigorous campaign to save their regulatory agency. In New Jersey, a proposed sunset law has drawn fire from the president of the New Jersey State Employees Association, Ben A. Valeri:

Under the provisions of this bill, entire state agencies could arbitrarily be wiped out at the whim of a legislative panel . . . unscrupulous officials getting power in the state could easily use this panel to persecute particular employees or reorganize the government to suit their own ends. . . . [The Sunset Act is] a veritable jaws of a bill, a mindless job-eating machine which will paralyze the state and cause employees to freeze with terror.

*Opposition Mounts to Proposed State Sunset Law*, N.Y. Times, Dec. 12, 1976, § 11, at 28-29, col. 1.

incentives for legislative oversight, it still does not furnish positive incentives for bureaucratic conformance with legislative policy. As one observer notes, "We must discover how program operators and clients can be rewarded rather than punished for drawing down budgets and ending programs."<sup>129</sup> Presently the incentives work the other way; if the program is discontinued, the bureaucrat is likely to be out of a job.<sup>130</sup>

The danger of legislative indifference to oversight still remains. Evaluation and reauthorization will continue to be a mundane struggle against a vast bureaucracy often supported by insistent parochial interests. Sunset is only a budgetary and oversight technique. It will not bring reform by itself. A legislature too willing to depend on staff reports and pro forma evaluation will make little progress toward effective oversight. Few would question that sunset is a meritorious idea worthy of "careful thought and experiment."<sup>131</sup> Translation of the idea into practical oversight will depend on much hard work in capital buildings across the country.

—John M. Quitmeyer

<sup>129</sup> 1977 *Hearings on S. 2*, *supra* note 8, at 341 (statement of Robert P. Biller, Dean, School of Public Administration, University of Southern California).

<sup>130</sup> *But cf.* Washington Sunset Act of 1977, 1977 Wash. Laws ch. 289, § 9(1), at 865 (1977) ("All employees of terminated state agencies classified under . . . the state civil service law, shall be transferred as appropriate or as otherwise provided in the procedures adopted by the personnel board."); TEX. STAT. ANN. art. 5429k, § 1.20 (Supp. 1978) (to same effect).

<sup>131</sup> Editorial, *And a Dim Dawn for Sunsets*, N.Y. Times, Feb. 16, 1977, at A24.